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Citation for published version:

Mackay, K 2013, *The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse*. Commissioner for Children and Young People.
<<http://www.sccyp.org.uk/ufiles/views-of-children-and-domestic-abuse.pdf>>

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

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**Scotland's Commissioner
for Children & Young People**

The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse

**A report to Scotland's Commissioner for Children and
Young People**

Dr Kirsteen Mackay

December 2013

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Citation for this report: Mackay, K (2013). The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse. Full Report. Edinburgh: Scotland's Commissioner for Children and Young People.

(CCYP/2013/02) Laid before the Scottish Parliament by the Commissioner for Children and Young People in pursuance of Section 12 of the Commissioner for Children and Young People (Scotland) Act 2003 on 5/12/2013.

KEY FINDINGS: Private law Contact Disputes in which there are allegations of abuse

This paper reviews the treatment of 155 children from 97 contact cases between parents in which there were allegations of abuse (Full methodology in **Annex A**).

Domestic Abuse in Private Law Contact Disputes

- Domestic abuse is alleged in half of all court actions over contact raised by a parent (see Mackay 2012) and in 100% of the cases analysed for this report.
- When alleged, overwhelmingly it is alleged by the mother (92%).
- When children were not seeing their non-resident parent, this was allegedly due to violence *upon the mother* in half the cases; while in 18% of cases it was allegedly due to physical or sexual violence upon the *child* and in 17% of cases it was due to non-physical abuse.
- Half the children were alleged to have witnessed acts of violence.
- In two-thirds of cases in which abuse was alleged, there was evidence of police involvement due to domestic abuse.

Characteristics of Children

- Over half the children were aged six years and under.
- Only 16% were aged 12 and over and therefore presumed competent to express a view.
- 40% of the children had never lived with both their parents at any point.
- 20% were living with their father when the case was raised. A third had been retained by their father after contact.
- 60% of children had exercised contact with their non-resident parent. Only 12% were still doing so at the time the case came to court.

Extent to which views are taken and how

- 20% of children were sent a form (F9) to give them the opportunity to express a view. Children sent this form were significantly more likely to express a view.
- 55% of children in total had their views on contact taken.
- From the age of five years, at least 71% of children had their views taken.
- 72% of children whose views were taken, had their views taken by a solicitor or social worker appointed to undertake a court report.
- Only 1% of children spoke to a sheriff and only one child had their own solicitor.

Views Children Express

- 55% of children who were asked their views did not want contact. Children described being hit and shouted at, destruction of property, feeling 'sad' or frightened and parental alcohol abuse as key reasons for not wanting contact.
- Most contact/residence disputes are raised by fathers (75%). In the cases in which domestic abuse was alleged, it is significant that over two-thirds of the children living with their mothers did not want contact with their father while two thirds of children living with their fathers wanted to return to live with their mother or to have more contact with her.

Contact Outcomes (where outcomes are known)

- The contact outcomes could only be discerned for 70% of children.
- Half the children were having contact by the final hearing. For a third of these the contact was supervised.
- Very young children who are *least* likely to be heard are *most* likely to be the subject of a contact order.

Impact of children's views on contact outcomes

- 45% of children had a contact outcome that was consistent with their views.
- 20% had a contact outcome that partially accommodated their views.
- 34% had a contact outcome that bore no resemblance to their views.

Factors impacting on the weight attached to children's views

- Whether the child's views are known.
- Whether a court report is undertaken and the attitude of the person taking the views of the child on the significance of domestic abuse to the issue of contact.
- The prior involvement of statutory agencies with the families.
- The age of the child.
- Whether the 'contact' parent is the child's mother or their father.

Use of Child Contact Centres (CCC)

- 38% of children who were the subject of a contact order had contact in a CCC.
- Two-thirds of children subject to a contact order in a CCC were under four years old.

Key Recommendations

- It should not be assumed that children will benefit from contact when there is evidence the contact parent is domestically abusive but background reports should be conducted. At present this assumption has the greatest impact on the youngest and most vulnerable children whose views are least likely to be taken.
- Court reporters often uncover evidence of abuse and enable children to be protected. Their function and scope must be retained and supported through training on the nature of domestic abuse and its impact upon children. Reporters' practice should also be regularly reviewed.
- All those who take children's views should be trained in the benefits of participation for children and given materials to support participation in practice.
- Improvements to the methods for taking the views of children are needed. Very young children would benefit from a specialist service of professionals with the skills to ascertain their views.
- Children should be protected from retaliatory abuse from a parent through careful reporting of their views.
- While children should be aware of the purpose of having their views taken and how their views will be used, they should not be sent a copy of the Initial Writ.
- Children's views should be acknowledged by the court and feedback given to them which includes the contact details of the Scottish Child Law Centre.

A: INTRODUCTION

Contact between a parent and a child may become an issue when the child's parents do not live together or when they have lived together but are now separated. This research briefing reports on the treatment of the views of children when their parents take a dispute over contact before a court in Scotland and there are allegations of domestic abuse made by one or both parents.

Only 5% of parental couples who do not live together are estimated to take a dispute over contact before a court in Scotland.¹ There were at least 1,700 private law actions related to either contact or the residence of a child raised in 2011-2012.²

When a parent raises an action for contact or for residence of their child in Scotland, the court is under a statutory duty to give the child concerned an opportunity to express their views after "taking account of the child's age and maturity."³ When a child then expresses a view, the court also has to "have regard to such views as he may express."⁴ The rules of court also state that the court is not to grant an order in a family action where a child has expressed their views "unless due weight has been given by the sheriff to the views expressed by that child, having due regard to [the child's] age and maturity."⁵

This opportunity to be heard is compliant with the requirement under Article 12:2 of the United Nations Convention on the Rights of the Child (UNCRC) which stipulates:

"the child shall in particular be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."⁶

This paper considers the treatment of the views of children in these court actions between parents through an analysis of data within the author's recent court-based "Listening to Children" study. This study reviewed the processes (court papers) of 208 cases, affecting 299 children, which were raised in two sheriff courts in Scotland in the one calendar year.⁷ For the purpose of this research briefing for the office of Scotland's Commissioner for Children and Young People, an analysis was made of only those cases in which domestic abuse was alleged by one of the parents or where one of the parties had a conviction for domestic or child abuse. Just over half of the children in the "Listening to Children" study fell

¹ Scottish Government (2008) *2007 Scottish Child Contact Survey*. Edinburgh, Scottish Government Social Research; Scottish Government (2009) *Growing up in Scotland: Sweep 3 Non-resident Parent Report*.

² Scottish Government (2012) Civil law statistics 2011-2012. Edinburgh. Table 9. Additionally, over 2,000 actions for parental rights and responsibilities were raised. Some of these would also have concerned the residence of a child or contact with that child.

³ Children (Scotland) Act 1995, s11(7)(b)(i), s11(7)(b)(ii)

⁴ Children (Scotland) Act 1995, s11(7)(b)(iii)

⁵ Act of Sederunt (Sheriff Court ordinary cause rules) 1993 No.1956 (S.223). Rule 33.19

⁶ The UNCRC was ratified by the UK government but has not been incorporated into UK domestic law by an Act of the UK government. This means it is not a part of the domestic law in any part of the UK but nonetheless the legislature agrees to ensure that legislation and government policies are consistent with the UNCRC. There is also a duty on all nations making up the United Kingdom to provide reports to the UN Committee on the Rights of the child on the extent to which children are able to exercise their rights within those jurisdictions.

⁷ For a full report on the "Listening to Children" study see: Mackay, Kirsteen (2012) [*The Child's Voice in Contact Disputes: Genuine Participation in Private Law Court Actions. Saarbrücken, Germany, Lambert Academic Publishing.*](#)

into this category and this paper reports on the treatment of the views of these 155 children from 97 cases.

Two questionnaires were also undertaken as part of the “Listening to Children” study, one of solicitors (n=96 responses) and one of parents whose child’s views had been taken by formal means as part of the court process (n=28 responses). Thirty-three interviews were also undertaken with sheriffs, solicitors, parents, children and non-legal practitioners who support children experiencing court-ordered contact [see **ANNEX A** for a fuller discussion of the research methodology].

The findings from this briefing will assist Scotland’s Commissioner for Children and Young People to plan and commission future research into children’s experiences of being heard in private law child contact disputes that go before the courts where there is a history of domestic abuse.

B: BACKGROUND – DOMESTIC ABUSE AND CHILD CONTACT

It is known that the majority of incidents of domestic abuse are not brought to the attention of the police, with only an estimated 16% of incidents of domestic violence being reported.⁸ In Scotland in 2011-2012 there were 59,847 incidents of domestic abuse reported to the police and in 81% of cases this involved a male perpetrator and a female victim.⁹ In 44% of all reported incidents the parties were no longer in a relationship but were ex partners or spouses, illustrating the vulnerability of individuals when they attempt to separate from a domestically abusive partner.¹⁰

Disputes within families where it is alleged there has been domestic abuse may become subject to legal proceedings in a number of ways in Scotland. When police are called to an incident of domestic abuse this may result in a prosecution of the offender within criminal legal process, while any children of the family are likely to be referred to a Children’s Reporter for consideration of whether there should be a hearing within the Children’s Hearings System.¹¹ Both these processes are *public* law processes as the ‘action’ is raised by a state authority (either the Crown Office and Procurator Fiscal Service or the Scottish Children’s Reporter Administration).

However, domestic abuse may become the subject of *private* law legal process when the victim of the abuse raises an action for a civil protective order (such as a non-molestation order) or defends an action for contact which has been raised by a violent partner or ex-partner. Domestic abuse may also be the motivating factor behind a married person raising an action for Divorce or seeking to secure the residence of their child via a residence order.¹²

⁸ British crime survey 2008-2009, cited in House of Commons Justice Committee *Operation of the family courts: sixth report of session 2010-2012* (2011), para 10.

⁹ Scottish Government (2012). *Domestic Abuse recorded by the police in Scotland*. 2010-11 and 2011-12. Statistical Bulletin, Crime and Justice Series. p1.

¹⁰ *ibid*, p. 5.

¹¹ See “Children’s Hearings System” in the Glossary at Annex F. Where children have been a victim of violence, a joint police and social work investigation may lead to a child protection case conference and possible child protection plan (see Scottish Government (2010) *National Guidance for Child Protection in Scotland*).

¹² In the child contact cases in which allegations of abuse were made, almost one in five actions were for divorce and 11% of mothers craved a non-molestation order or an interdict against contacting the child as their primary crave.

The 97 cases concerning 155 children which were analysed for this paper are all *private* law cases raised by a parent (and, in four cases a grandparent) in which the court was asked to decide the amount of contact between a child and a parent in the context of domestic abuse.

C: THE LEGAL FRAMEWORK APPLIED TO PRIVATE LAW CHILD CONTACT DISPUTES

When a parent raises an action for contact (or residence) with their child in Scotland they do so under the provisions of the Children (Scotland) Act 1995 (hereafter the 1995 Act). The 1995 Act lists the rights and responsibilities that parents have towards their child or children.¹³ Even when separated or divorced, both parents who are named as a parent on the child's birth certificate retain these parental rights and responsibilities in respect of the child.¹⁴

One parental right and responsibility is the requirement that parents "maintain personal relations and direct contact with the child on a regular basis" when they do not live with the child. Parents also have the right to "have the child living with him or otherwise to regulate the child's residence." Conflict can therefore arise as either parent may lawfully retain the child unless this particular parental right is removed by the court or the court grants a residence order to just one parent.

Court actions that relate to parental responsibilities are raised under Section 11 of the 1995 Act and that section stipulates the principles the court is to apply when considering making an order. Firstly, the court is to "regard the welfare of the child as its paramount consideration."¹⁵ In most cases it is assumed that the child will benefit from on-going contact with both parents post-separation, rather than a parent having to lead evidence that this is, in fact, the case.¹⁶

The second principle is that the court should not make an order unless it is better for the child that an order be made.¹⁷ This 'minimum intervention principle' reflects the requirement that the state should not interfere unnecessarily with arrangements reached by parents.

Thirdly, it is in this section of the 1995 Act that the principle of the participation of the child in proceedings is stated as 'a child who is competent to form a view is to be given the opportunity to express his or her views'.¹⁸ Children are presumed to be competent to form a view from the age of 12 years but may be deemed competent below this age.¹⁹

A fourth principle was added to the 1995 Act when it was amended by the Family Law (Scotland) Act 2006. This Act introduced the statutory duty to consider the need to protect a

¹³ Children (Scotland) Act 1995, s 1 and s2.

¹⁴ The Family Law (Scotland) Act 2006 gave unmarried fathers parental rights and responsibilities if they are registered as the child's father for children born on or after 4th May 2006.

¹⁵ Children (Scotland) Act, s 11(7)(a).

¹⁶ *White v White* 2001 SLT 485. Prior to this case, it was said the parent seeking contact had to demonstrate it would be of benefit to the child in *Sanderson v McManus* 1997 S.C. (H.L.) 55.

¹⁷ Children (Scotland) Act, s 11(7)(a).

¹⁸ Children (Scotland) Act 1995, s 11(7)(b).

¹⁹ Children (Scotland) Act 1995, s11(10).

child from abuse when considering making an order that relates to the exercise of parental rights and responsibilities.²⁰ Abuse is defined in the following terms:

“‘abuse’ includes violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress.”²¹

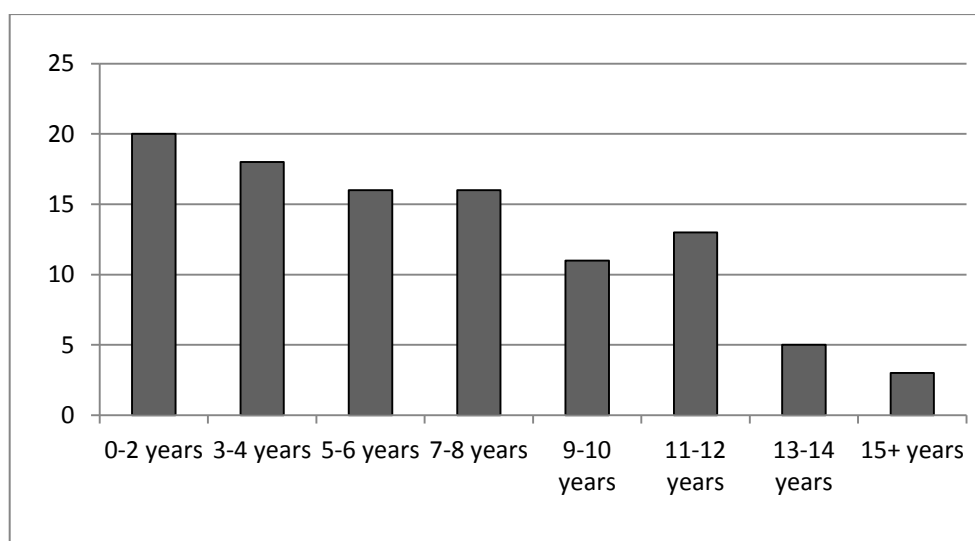
These four principles form the legal framework guiding court decisions over contact when private law contact disputes are brought before the courts.

D: FAMILY DYNAMICS OF CHILD CONTACT DISPUTES WHERE THERE ARE ALLEGATIONS OF ABUSE

Three-quarters of child contact disputes before the courts were raised by fathers. Forty per cent of the parents had never lived together at any point, 37% were former spouses and 22% were former cohabiting couples.

Forty-three per cent of the court cases concerned just one child but in 30% of cases there were two children who were the subject of the action, while in 20% of cases the case concerned three siblings. The dispute was over contact with four or more children in 7% of cases. **Fig. 1** below presents the ages of the 155 children in the court data set. Over half the children were aged six years and under. Just 16% were aged 12 and over and therefore benefited from the legal assumption that they are competent to form a view.²²

Fig 1: Percentage of children of different ages in the data set (n=155)



²⁰ Children (Scotland) Act 1995 s11 (7A) – s11 (7E), as amended, which came into force on the 4th May, 2006.

²¹ Children (Scotland) Act 1995, s 11(7C).

²² Children (Scotland) Act s 11(10); Age of Legal Capacity (Scotland) Act, s 2(4A).

Residence of the child at the time the action was raised

Almost one in five of the children were living with their fathers alone at the time the case came before the court. This is far higher than the national average of 8%.²³ Closer analysis revealed that almost a third of the 27 children who were living with their fathers at the time the action was raised had allegedly been retained by him against the wishes of the child's mother – either after contact or after a period of temporary residence. In one further case, a pre-school child had allegedly been taken from the mother by force while an accomplice of the father held the mother down.

Overall, in 10% of cases mothers referred to previous 'abductions' of their child by the child's father while *threats* to abduct were common, with 21% of mothers stating the other parent had threatened to take the child. In one case, the mother alleged the father had told her he would take their daughter "away like Maddie McCann;"²⁴ while it was alleged in another case that the father, who had himself been taken from *his* mother as a child and retained by his father, intended to do the same thing to his child.

Allegations of abuse within the court processes

Domestic abuse was alleged by the mother of the child in cases affecting 92% of the children; while fathers alleged domestic abuse in cases affecting 11% of the children (n=16). Both parents made allegations of abuse in cases affecting 3% of the children (n=4).

Half the children were expressly stated to have witnessed the domestic abuse of their parent.

Where mothers alleged domestic or child abuse, either in the Initial Writ or in their Defences, the alleged perpetrator was the child's father in 92% of cases. Where the father was the alleged perpetrator, the alleged victim was the mother of the child in 70% of cases, both the mother and at least one child in 21% of cases and a child alone in 8% of cases.

There were 16 children whose fathers alleged domestic abuse from nine cases. Four of these fathers stated they had been the victim of abuse at the hands of the child's mother and in the three cases that were defended, the child's mother also described abuse perpetrated by the father of the child. In the most extreme of these cases the mother alleged the father of their children had attempted to rape her and goaded her to hit him before presenting himself at a police station and asking them to photograph the scratch marks on his face.²⁵

In three of the remaining five cases in which men alleged abuse, the father of the children stated that the new partner of the children's mother was violent (either to the mother of the children, or to both the children and their mother). In one of these cases the 13 year old boy had returned to live with his father after his mother's new boyfriend had attempted to strangle him. In the final two cases, it was claimed that the children were hurt by their mothers – in one case she allegedly hit the children with wooden spoons and in the other case it was alleged the mother had kicked her six year old son in the groin.²⁶

²³ Office of National Statistics, *Lone Parents with dependent children*. (2012), p 1. Available at http://www.ons.gov.uk/ons/dcp171780_251303.pdf (last accessed on 03.07.13).

²⁴ A reference to the child who has been missing since she was abducted from the apartment in Portugal where she was staying with both her parents and her sibling in 2007.

²⁵ One of the children of the family described witnessing this after hearing her mother's screams.

²⁶ The children recalled this incident when spoken to by a court reporter.

There were also allegations of other behaviours that posed a potential risk to the children, with substance abuse being alleged by a parent in 36% of cases and allegations that the other parent was unfit to parent due to mental illness being alleged in 14% of cases.

History of contact between the children and their non-resident parent

Despite the background to the cases coming before the courts, a significant number of these children (41%) had exercised contact with their non-resident parent either since separation or birth. However, in most cases this had broken down and only 12% of the children were still exercising contact at the time the court action was raised.

In 85% of cases in which there had either not been any contact, or the contact had broken down, this was allegedly due to the domestic abuse. In over two-thirds of cases this alleged abuse was either physical or sexual in nature. In a further 17% of cases other types of abuse were alleged to be the key reason for the cessation of contact – most usually verbal abuse such as threats to kill the other parent and threatening behaviour and insults directed towards the child. See **Table 1** below.

Table 1: Primary alleged reason for the cessation of contact between a child and the non-resident parent, where known (n=124).²⁷

Physical or sexual abuse against a parent	Physical or sexual abuse of a child	Non-physical domestic abuse*	Quality of contact concerns**	Retention of child by non-resident parent	Resistance to demands for increased contact
50%	18%	17%	9%	5%	2%

* 'Non-physical domestic abuse' includes verbal abuse and threats to kill or abduct the child, restrictions of movement, surveillance, and controlling access to money.

***'Quality of contact concerns' includes: neglecting the child during contact (such as shutting in a room with the television set all day), the abuse of substances by the non-resident parent during contact or leaving the child with third parties.

Evidence of abuse within the court processes

The most usual mechanism the court uses to determine whether there is any factual basis to the allegations made by parties is by ordering a report into all the circumstances of the child and the arrangements for the future care of the child.²⁸ As one sheriff in interview observed:

“I find reports invaluable as they communicate to the sheriff what is not presented by any of the parties as they don’t want you to know. They can investigate factual matters so if one party is crying “black” and the other “white,” the reporter can get factual clarity.”

²⁷ For 12 children, it was unclear why contact had broken down. Nineteen children were still exercising contact at the time the case came to court.

²⁸ Under the Act of Sederunt Sheriff Court (Sheriff Court Ordinary Cause Rules), r 33.21 and Matrimonial Proceedings (Children) Act 1958, s 11.

In interview, sheriffs cited both total cessation of contact and allegations of domestic abuse as triggers for the ordering of a court report. Reports were ordered in respect of 58% of children.

None of the 97 cases comprising the data set went on to a full proof hearing in which the parties may present evidence and both they and their witnesses may be questioned by the other side.²⁹ The courts therefore relied on the efforts of court reporters who contacted the police for records of incidents at the family home and who obtained extracts of convictions for criminal offences. Reporters also spoke to a wide range of individuals such as members of the child's wider family, teachers or nursery staff, neighbours of the family, general practitioners and workers on drugs programmes, women's aid workers or staff from domestic abuse perpetrator programmes. This enabled them to glean a full picture of the circumstances of the child.

As a consequence, in almost two-thirds of the cases there was a record of police involvement with the families due to domestic abuse. Additionally, a third of children (27%) had a father who fell into *at least one* of the following three categories: 'subject to concurrent criminal proceedings, 'previous convictions for domestic or child abuse,' 'in prison at the time the action was raised.'

That is:

- 19% of children's fathers were the subject of concurrent criminal proceedings for domestic abuse at the time of the contact action.
- 17% of children's fathers had previous convictions for abuse of the mother or the child.
- Seven children's fathers had been convicted of the sexual abuse of a child.
- The fathers of ten of the children were in prison following conviction for domestic abuse or child abuse at the time the action was raised.
- 10% of fathers were the subject of a civil interdict (such as a non-molestation interdict) at the time the action for contact was raised.

It is possible that some of these factors may have existed in other cases in which reports were not ordered or in cases where the reporter chose not to investigate the allegations of abuse.

As many women had fled violence within the family home, almost a quarter of the children were living in a women's aid refuge with their mothers at the time the action was raised. There was also evidence that there had been the prior involvement of social workers with the families of a third of the children and 10% of the children were the subject of a supervision requirement put in place by the children's hearings system.³⁰

No mothers were in prison at the time the action was raised and there was only evidence that one mother had a previous conviction (for shoplifting), for which she had served a prison sentence.

²⁹ For although these hearings were set in 16 cases (affecting 30 children), they were later discharged.

³⁰ Under s70, Children (Scotland) Act 1995 at the time of the data set cases. See Glossary, Annex F.

Interplay of ‘public’ and ‘private’ legal process

In some cases the action was raised by a parent in the wake of a restriction being placed on their exercise of parental rights by the Children’s Hearings System – such as that contact be supervised within a social work run children and families centre. The court routinely notified the relevant social work department of the action, consistent with the rules of court which stipulate that “in any family action where the pursuer craves [asks] a residence order in respect of a child, the sheriff may, if the sheriff thinks fit, order intimation to the local authority in which area the pursuer presides.”³¹ As this generated a written response from a social worker, there was a letter from a social worker in a third of cases.

It was also common for the court to appoint social workers to undertake the background welfare report, rather than a solicitor when it was apparent at the start of the action that there was already social work involvement with the family. Fifteen per cent of court-ordered reports were therefore undertaken by social workers rather than solicitors.

In respect of 8% of children, fathers made apparently malicious allegations that the mother of the child was unfit to parent the child, prompting social work investigations that resulted in letters to the court in which social workers usually expressed the view that the father was trying to drag them into an acrimonious separation when there was nothing to suggest any form of statutory intervention was required. In contrast, one father successfully had the case referred by the sheriff court to the Children’s Reporter on the grounds that his child’s non-attendance at school since being taken to a refuge by her mother was evidence of her *mother’s* “lack of parental care.”

E: CHILDREN’S VIEWS IN CHILD CONTACT DISPUTES IN WHICH THERE IS A HISTORY OF ABUSE

Children’s views are more likely to be taken in cases in which abuse is alleged or uncovered by the reporter. Across the data set, over half the children (55%) expressed a view on contact as part of the court process (n=85). This contrasts with only 32% of children expressing a view on contact in cases in which no abuse is alleged.³²

In Scotland, children’s views may be taken by a number of means:

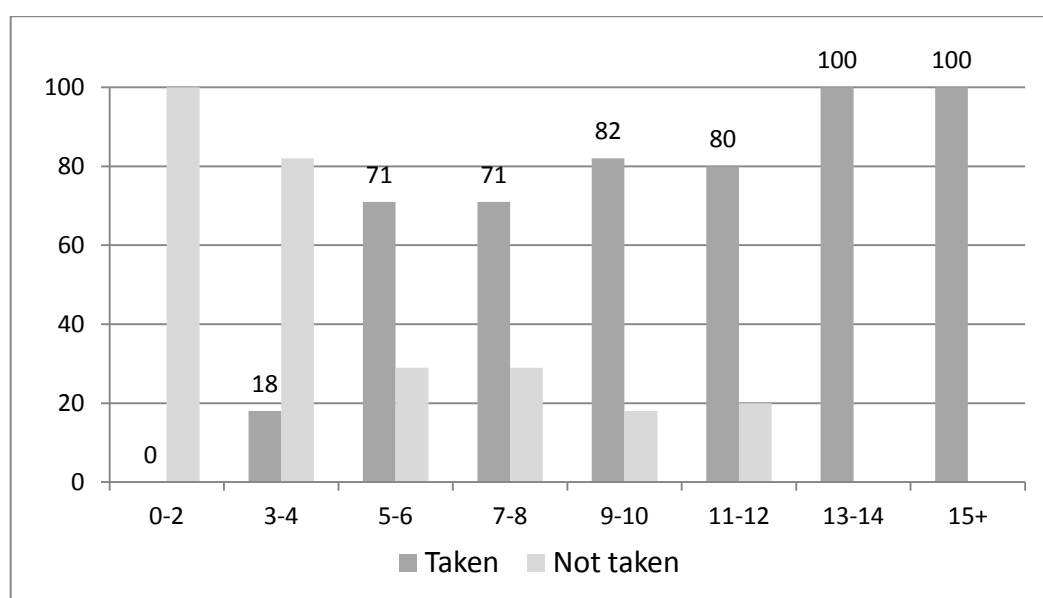
- They may be sent a Form F9 on which they may write their views.
- They may write a letter addressed to the court.
- They may have their own solicitor to represent them.
- They may speak directly to the sheriff in his or her chambers (room).
- They may be spoken to by a curator *ad litem* appointed to represent their interests.
- They may be spoken to by a solicitor or social worker appointed to undertake a report into the circumstances of the child.

³¹ Act of Sederunt Sheriff Court (Sheriff Court Ordinary Cause Rules), r 33.12

³² See Mackay, Kirsteen (2012) [*The Child’s Voice in Contact Disputes: Genuine Participation in Private Law Court Actions. Saarbrücken, Germany, Lambert Academic Publishing.*](#) **Note:** the increased percentage of children having their views taken in cases where abuse is alleged may be partially due to the fact that children’s views are most usually taken by a court reporter and it is the reporter who may uncover evidence of incidents of domestic abuse even when it has not been alleged.

Very young children are a vulnerable cohort within legal process as the age of the child has a significant impact on whether or not they have their views taken. In the data set, no children aged under three years were spoken with for the purpose of gauging their views and only 18% of children aged three and four years of age had their views on contact taken. This leapt considerably by the time a child was five years, remaining constant at 71% of children up until the age of nine years, where the percentage of children spoken with increased to 82%. All the children aged 13 and over had their views on contact taken. See **Fig 2** below.

Fig 2: Percentage of Children of Different Age Bands having their Views Taken (n=155)



Close to a quarter of children who expressed a view did so by more than one means (**Table 2**). For example they might write to the court having previously being spoken to by a reporter. Two children were spoken with by a child psychologist at some stage of the process, who then put their views to the court.

Table 2: The number of children expressing their views by each of the different means

Means of expression	Number of children
Court Reporter (Solicitor)	51
SW Report	10
SW spoke to child (not as part of report)	6
Curator <i>ad litem</i>	10
Psychologist	2
Sheriff	2
Own Solicitor	1
Form F9	15
Letter to the Court	7

As some of the 85 children who expressed their views as part of the court process did so by more than one means, this means the total number of formal expression of views listed in Table 2 is 104.

Form F9

The Form F9 is the means by which children are given the opportunity to say whether they wish to express a view or not (see **ANNEX G**). This is in contrast to speaking with a court reporter, where it is usually up to the individual reporter whether the child is spoken to or not. Once returned to the court, the sheriff has the option to direct that the views of the child should be sealed in an envelope marked “views of the child – confidential.”³³

All court actions raised under section 11 of the 1995 Act have to *either* crave (ask) the court to send the child notice of the court action so that they have the opportunity to express their view, *or* ask the court that this notice (called intimation) is dispensed with.³⁴ If the intimation is granted by the court, the child is then sent a Form F9 which tells the child what the sheriff has been asked to decide and enables them to either nominate a person to tell the court their views for them, or to write these views themselves in a box headed “what I have to say about my future.” The form also tells children that they may get free help from a solicitor and gives them the free phone number of the Scottish Child Law Centre for free advice.

- Intimation was granted by the court for 84% of children in respect of whom it was craved.
- 20% of children were sent a Form F9. Half returned it. All were aged seven years and over.
- Sending a child a Form F9 significantly increased the likelihood of that child’s views being taken, with 90% of children who received intimation expressing a view by some means.

³³ Act of Sederunt Sheriff Court (Sheriff Court Ordinary Cause Rules), r 33.20(1)(a).

³⁴ Act of Sederunt Sheriff Court (Sheriff Court Ordinary Cause Rules), r 33.7(h).

In the vast majority of cases, solicitors acting for the parents asked the court to dispense with sending an F9 form on the basis of the “tender years of the child.” This phrase was even used for children aged 12 years and over. There are a number of reasons that intimation of the child is usually dispensed with. A key reason is the belief the child will be influenced by a parent in respect of what they write on the form. One sheriff in interview observed:

“I have reservations about using this method as you have no clear idea how the F9 is presented to the child. Do they understand the form? Are they influenced by their resident parent? You cannot know the circumstances in which the form is completed.”

Intimation was either granted at the first hearing in the case or not at all in all but one case. When sheriffs deferred intimation and later sought the child’s views, they did so via a court reporter.

In interview, solicitors also said they took guidance from the parent they were representing as to whether or not the child wished to express a view. If so, they were more likely to crave intimation of the child. However, a key barrier to children being intimated via a Form F9 was the erroneous belief among practitioners that the child should then be sent the Initial Writ – which usually includes unpleasant allegations including descriptions of abusive behaviour when this is being alleged by the pursuer.

Further, when children were sent a Form F9, the completion of the form was not always straightforward as the Forms F9 often still included the instructions for solicitors in respect of their completion and they often failed to clarify what aspect of “their future” the child was being asked to express a view on.³⁵ Once returned, six of the 15 returned Form F9s were sealed and marked as “confidential,” however the rest lay open in the court papers.

Solicitor representing a child client

A second means by which children may put their views to the court is via a solicitor they have instructed to represent them. Under the Age of Legal Capacity (Scotland) Act 1991 children are able to instruct a solicitor in any civil (non criminal) matter, providing they have the “general understanding of what it means to do so.” They are assumed to have this understanding at the age of 12 years,³⁶ but this does not mean they cannot be assessed as having sufficient understanding below this age. Although children have the right to attend court hearings,³⁷ most sheriffs are of the view this is not an appropriate place for a child and, rather than children attending the hearing, their solicitor can do so on their behalf. A child’s solicitors may also write a letter to the court containing the views of the child as expressed to the solicitor, or they may submit a signed written statement made by the child (affidavit) if the case is to go to a proof hearing.³⁸

- Only one of the 155 children in the data set had their own solicitor – who was appointed by the court in advance of a proof hearing which was later discharged.

³⁵ Copies of the Form F9 as sent were attached to the processes.

³⁶ Age of Legal Capacity (Scotland) Act 1991, s 2(4A).

³⁷ Act of Sederunt Sheriff Court (Sheriff Court Ordinary Cause Rules), r 33. 22A(5).

³⁸ In *Fourman v Fourman* (1998) Fam L.R. 98, the court approved of a child’s views being put by affidavit.

Because a child may be very unlikely to be able to locate or get to a solicitor's office without the assistance of an adult, legal practitioners and sheriffs tend to suspect parental pressure and influence is a factor when children approach a solicitor. In interview, one sheriff observed:

"If say a mid-age child instructs a solicitor, how did that child find the solicitor? Who took the child to the solicitor's office? I think in such cases a child will always be subject to influence in some way, so if they express views in a solicitor's letter, I think those views are questionable."

In interview, several solicitors expressed reluctance to represent child clients – partly because they are aware sheriffs are generally negative about children entering court process:

"I think over time sheriffs have become very concerned about how children can be manipulated I expect. I had one recently and it kept coming up that the child was so articulate and kept expressing her view so I told the mother to tell her she can go and see her own solicitor [...] The sheriff saw us as manipulating the situation [...] and the child had written the most horrible letter about the father which, as I am the solicitor for the mother, how can I justify that? [...] It can be held against a parent that they have enabled a child to allow a solicitor to represent them."

Interviewer: Does that put you off representing a child?

"Oh absolutely yes, it puts me off attempting to represent a child in the court setting."

When a child visits a solicitor's office with the view of obtaining legal representation, it is the solicitor who assesses whether or not they believe the child has the required "general understanding." In one case in the court data set, the mother of a seven year old girl thought her child was of sufficient maturity to instruct a solicitor and that her child was expressing a clear view. The solicitor the child spoke with did not agree to represent the child however and wrote a letter to the court stating:

"The child certainly did express the view that she did not want to see her dad, but I formed the view she was not of sufficient maturity to instruct a solicitor. In any event [the child's] expressed view would not necessarily coincide with whether or not contact would be in her best interests and this, of course, is the question the court will address."³⁹

An additional hurdle to children obtaining their own solicitor to represent them is that any solicitor willing to act for the child has to persuade the Scottish Legal Aid Board (SLAB) that separate representation is necessary. This is against the background that SLAB assume a parent will be able to put the child's views to the court.⁴⁰

³⁹ The court initially ordered contact in a child contact centre due to the concerns of the mother and then residential one weekend a month but as the father failed to turn up to exercise contact the case was sisted.

⁴⁰ In *Henderson v Henderson* (1997) Fam L.R. 120, the sheriff depreciated any tendency for children to enter the action, where their view correlates with that of a parent. The Civil Legal Aid (Scotland) Amendment Regulations 2010 introduced the requirement to take the resources of the child's parent into account when assessing a child for legal aid – making it less likely that a child's views will be accepted as their own.

When separate representation is achieved, a further barrier is the fact that no “child friendly” standard court papers have been developed other than the Form F9 and, as such, they are largely incomprehensible to a child.

Speaking to a sheriff

Another means by which children’s views may be made known to the court is by children speaking directly to the sheriff deciding the case. This is usually done within the sheriff’s chambers (room) and a sheriff clerk may also be present to reassure the child. In interview conducted with sheriffs as part of the “Listening to Children” study, some sheriffs indicated that children are interviewed far less often since Form F9 was introduced in the wake of the 1995 Act.

- Only two of the 155 children in the data set spoke to the sheriff [see **ANNEX B**].

In addition to the Form F9 largely supplanting judicial interview as a means of taking children’s views, sheriffs expressed reservations about bringing a child into the court environment and some doubted their own ability to gauge the extent to which the views a child expressed were their own.

“How can one know if the views they express are genuine or their views have been influenced. Even in a ten to fifteen minute chat one cannot necessarily form an opinion whether their views are genuinely held beliefs. So I have reservations.”

Consequently most sheriffs never or only rarely interview children in child contact disputes.

Curator *ad litem*

A curator may be appointed by the court to protect the *interests* of the child throughout the process, with the potential to enter as a party to the action to protect these interests.

- While 21 children in the data set had a curator appointed in respect of them, only ten children had their views on contact taken by that person.

In contrast to the role of a solicitor appointed by the child, a curator *ad litem* may openly disagree with any perspective the child expresses to them where they believe the child’s view is misguided. When a curator *ad litem* has been appointed and the child does not agree with the view that person presents to the court and wishes to have their own solicitor, the court may refuse to allow the child to obtain their own legal representation.⁴¹ When a child *does* have a solicitor putting their views to the court directly, the court may nonetheless appoint a curator *ad litem*.⁴²

An unexpected finding of the present research is that children were most likely to have a curator *ad litem* appointed to represent their interests when they were of the age that they are to be presumed to be capable of formulating and expressing a view. Interviews with legal practitioners revealed this is because courts suspect children will be manipulated by parents, rather than expressing a genuine view they have arrived at independently. Thus a third of children aged 12 years and over had a curator *ad litem* appointed to them compared to only

⁴¹ *B v B* (2011) S.L.T. (Sh Ct) 225

⁴² *R v Grant* (2000) SLT 372

5% of children aged five years and younger (as younger children are very unlikely to have their views taken).

Court reporter / Social work report

By far the most common means by which children's views are taken is through their inclusion in a report ordered by the court. Although reporters are usually appointed to "investigate and report to the court on the circumstances of a child and on proposed arrangements for the care and upbringing of the child,"⁴³ they may also be appointed for the purpose of taking the views of the child. Interlocutors recorded that the reporter was to take the view of the child in 22% of appointments.

- A report was ordered in respect of 58% of the children in the data set and two-thirds of these children had their views on contact taken by that person.
- Most reports were undertaken by solicitors but 15% were undertaken by social workers.

At present in Scotland court reporters receive no specific training for reporting on the circumstances of a child, nor on speaking with children, nor on the impact of domestic abuse on children. This is despite their enormously influential role – with the court ordering in line with their recommendations in all but one of the cases in the present data set. Nonetheless many court reporters demonstrated skill in obtaining the views of children. A popular tool used by reporters was to ask the child to list his or her 'three favourite men' and 'three favourite women' and/or to list three things they like about 'daddy' (which would be repeated for 'mummy') as well as three things they dislike about 'daddy' (and then 'mummy'). The most commonly given responses to things they did not like for these children who had lived with an abusive parent was that "he shouts" "he hits" "he drinks" and these came up time and again in court reports.

The cost of a court report can be prohibitive where parents are not in receipt of legal aid. In one case in the court data set, the mother's solicitor wrote to the court stating:

"Since reports regularly cost £3,000 or more (often more than the entire cost of the case), this caused my client alarm and she was not prepared to instruct the report." "I am unable to act without instructions as we cannot incur this expense. For this reason, the report has not been commissioned."

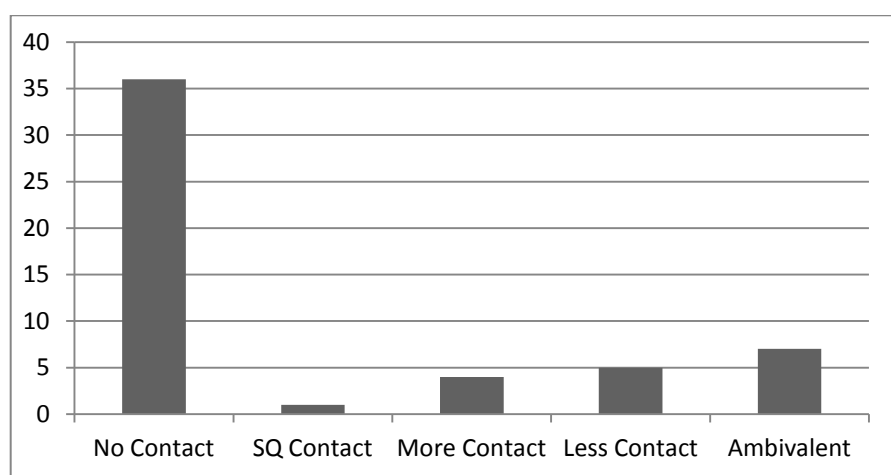
In this case the children father had criminal convictions for assault and harassment and a later report was undertaken by a social worker. This revealed the previous abduction of the older child during contact, as well as a report into the younger child's disturbed behaviour as at only 8 years of age she threatened to kill herself and would stand with a knife pressed to her body. This case was not the only one in which the cost of a report might have prevented a court being informed of matters pertinent to the promotion of the child's welfare.

⁴³ Act of Sederunt Sheriff Court (Sheriff Court Ordinary Cause Rules), r 33.21.

The views children expressed

The views of 71 of the children are known, while the views of the remainder were either marked as 'confidential' or were not submitted in writing and so not a part of the court papers. The most common view, expressed by 55% of children whose views are known, was that they did not want contact with their non-resident parent. However, the profile of the views the children expressed in respect of contact with their non-resident parent varied according to the sex of the parent they were living with. Fifty-three lived with their mother, 14 with their father and four with their grandmother.

Fig 3: Number of children living with their mothers expressing a particular view (n=53)



Note: "SQ Contact" is short for "status quo contact" and means the contact in place at the time the action was raised continues.

When children were living with their *father*, the most prevalent view was either that they wanted to return to live with their mother (n=5) or that they wanted contact with their mother to either continue or increase (n=5). Only one child wanted to see less of their mother who ignored her during contact; while three children (from two cases) wanted no further contact with mothers they remembered being abusive.

By contrast 68% of the children living with their mothers stated they did not want to have contact with their father (n=36) and most of these children described abusive behaviour perpetrated by him. All four children living with their grandmothers said they wanted to continue to see their mother and two of them were hopeful they might return to live with their mother.

Some children expressed their views directly in letters to the court, providing a particularly poignant insight into their experiences of contact. In the below extracts the children's spelling errors have been corrected for ease of reading:

"Our dad is very competitive but he takes it too far. He tells us we are fat and makes us go for runs which we hate.... he shouts at us and swears and calls us bastards...I feel sad and powerless that we don't get our say." Boy, age 13

"I do not want him anywhere near me or my family. You make me very very sad[..] You was very very bad to me and the family when I was with him he broke my heart. I do not want to go to stay with you at the weekend [...] you swore in my mum's face." Girl, age six

"As you all well know my dad is not a pleasant human being to live with. He is violent and dangerous. I would not want to be miserable or permanently in hospital. I want nothing whatsoever to do with him in the future or now." Girl, age 13

"I don't want to see Gran because she made me see my dad who made me do all the chores and if I didn't he hit me. He treats the other children [step siblings] like they are number one and I am invisible. They wouldn't let me phone home and would not let me go home. This makes me really sad." Girl, age 10

A far greater number of children had their views put to the court through the person appointed by the court:

"She does not want to see her dad. He shouts, slams doors, and threatens to throw out her toys and to stop her seeing her best friend. She was adamant she does not want to see him." View of eight-year-old girl, given to curator *ad litem*.

"Both children told their present social worker that they did not enjoy their last visit with their dad because he got drunk and was shouting and because he smacked them." View of six-year-old boy and four-year-old girl, presented by a court reporter (citing conversation with social worker undertaken as part of a report).

Although the majority of children living with their mothers in these cases in which domestic abuse was alleged stated they did not want to see their non-resident parent, not all children expressed this view. Seven of the children living with their mother expressed an ambivalent view about contact, while five wanted less contact and five children (from three cases) wanted to have contact with their father. In some cases this was because the child questioned had either not witnessed the violence or was not a primary victim of the abuse. However, for most children witnessing the abuse of their mother or being mistreated during contact resulted in them clearly expressing the wish not to be ordered into contact.

F: ISSUES AFFECTING CHILDREN'S 'FREE' EXPRESSION OF VIEWS IN PRIVATE LAW CHILD CONTACT DISPUTES

Part one of Article 12 of the UNCRC states that:

“States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”

There are however a number of barriers to children's 'free' expression of their views in the context of a child contact dispute. These include:

- Whether they are given the opportunity to express their views.
- Lack of confidentiality.
- Wish not to hurt a parent's feelings.
- Fear of angering a parent and fear of being made to see a parent.
- Unused to discussing feelings / limited vocabulary for feelings.

The views children express as part of a court action are not guaranteed to be kept confidential as courts start from the principle that all parties have a right to know what has been put before the court, which may prevent them achieving the outcome they seek.⁴⁴ In the context of a child contact dispute, judicial opinion in Scotland has gone so far as to state that the welfare of the child is no longer the paramount consideration when deciding whether to keep the child's views confidential.⁴⁵

A quarter of solicitors responding to the questionnaire for solicitors undertaken as part of the 'Listening to Children' study said they would only 'sometimes' explain to children that their views would be shared with their parents. The most common explanation for this was that "it depends what they [children] are saying" which is suggestive that when children *are* advised their views will not be kept confidential this may not happen until *after* they have expressed their views.⁴⁶

In the cases in the court data set there was no consistent approach to protecting children fearful of an abusive parent learning the views they have expressed. In some cases, the reporter took this fear on board and submitted the child's views separately to the sheriff in an envelope marked as 'confidential' and for the 'attention of the sheriff', but in other cases the views were included in the report.

In some cases children may choose not to say what they want for fear of a parent. In one of the cases in the data set an eight year old girl had been retained by her father after contact and was spoken with on two occasions by the reporter. It was not until the reporter's second visit that the girl told the reporter she "would like to stay at her mum's house during the week and be with her mum." When asked, the girl explained she had not said this to the reporter on

⁴⁴ Consistent with Article 6 (3)(a) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the right to be informed of accusations against him).

⁴⁵ *Oyeneyin v Oyeneyin* (1999) G.W.D. 38-1836. See also: *McGrath v McGrath* (1999) S.L.T. (Sh Ct) 90

⁴⁶ There were 51 responses from solicitors to this question.

her first visit at her dad's house because she was scared the reporter would tell her dad what she had said while she was there with him. However by the second visit the child was back in her usual home with her mother.

It can also be difficult for children to explain how they 'feel' about contact with a stranger. Not all children are accustomed to describing feelings and children may have a limited vocabulary to describe negative feelings. Young children in particular may only have the word "sad" to describe negative feelings, including fear.⁴⁷ In one case a nine year old boy was asked how he felt about going to his dad's house for contact and responded, "Alright." As there were allegations that his father's girlfriend was abusive towards him, he was asked whether she was unkind to him. He said "no" but *then* stated that she had kicked him when he accidentally made a mess and that he was shut in a dark room at night and wanted the light on. As children may blame themselves when adults aggress towards them and assume they must have done something wrong, it may be difficult for them to make a value judgment on the behaviour of the aggressive adult.

Similarly, when the aggression is directed by one parent upon the other, children may side with the aggressive adult and even join in the denigration of their other parent. In one of the data set cases, the mother fled to a refuge with her young son only and told the reporter she had left her older two children in the family home with their father for this reason.

Whether in the context of domestic abuse or not, when children's views *are* to be taken, they should be given time to think about what they wish to say and, in most instances, they would benefit from knowing *in advance* of a reporters visit that they are going to be spoken to and why. They would also benefit from being able to discuss options and possible outcomes. They also clearly need to be informed that their views may not be kept confidential. At present, there are no standardised procedures to ensure any of these things occur. In addition, children are currently not given any feedback when they express their views to the court and they are not advised what they may do if they are not happy with the outcome of the court action. In the absence of these features, the participation of children in legal process may be little more than tokenistic, rather than a genuine attempt to include them in the decision-making process.

G: WEIGHT ATTACHED TO THE VIEWS CHILDREN EXPRESSED – IMPACT ON CONTACT OUTCOMES ⁴⁸

Court Outcomes

Although 66 children were the subject of an interim order for contact at some stage of proceedings, only 26 children were the subject of an order for contact at the final hearing in the case. The parents of a further 17 lodged a joint minute as part of the process, which specified the amount of contact. **Table 3** presents the case outcomes for children where known.

⁴⁷ Aldridge & Wood (1998). *Interviewing Children: a Guide for Child Care and Forensic Practitioners*.

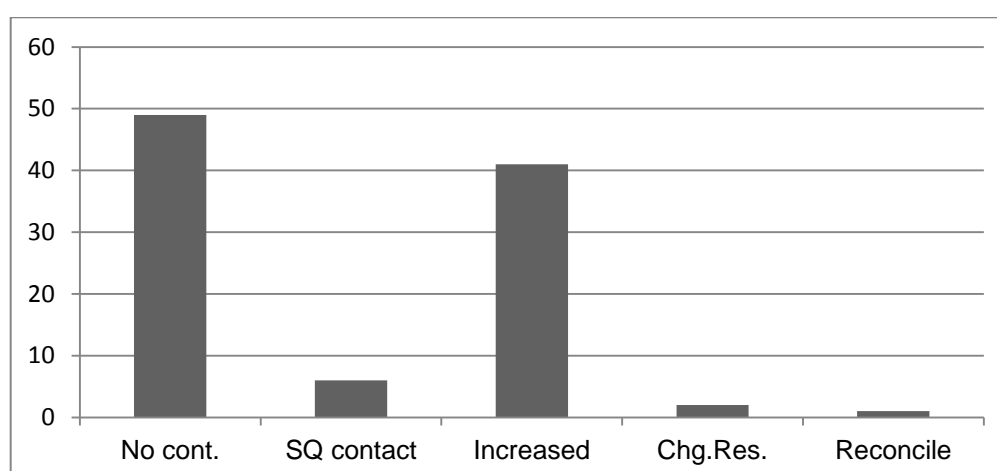
⁴⁸ Three-quarters of the children for whom the contact outcomes are known were living with their mothers (n=90), 20% with their fathers (n=24) and 3% with a grandmother.

Table 3: Case outcomes for the children (n=155)

Case outcome	Percentage of children
Case dismissed	43%
Court order for contact	17%
Joint Minute Specifying Contact	11%
Action was sisted / dormant	23%
other	7%

Contact Outcomes

The contact outcomes can be discerned for 119 children in the court data set (77% of children) (see **Figure 4**). In cases which were dismissed it was sometimes unclear whether contact was taking place or not.⁴⁹ The contact outcomes in the cases *where these are known* may not be representative of the contact outcomes for the remaining 23% of children for whom the contact outcomes are *not* known.

Fig 4: Percentage contact outcomes for children living with their mothers (n=90)

Note: “SQ Contact” is short for “status quo contact” and means the contact in place at the time the action was raised continues.

By the final hearing in the case over half of all children were having contact (54%).⁵⁰ Contact had increased for 41% of the children living with their mothers.⁵¹ When children were living with their fathers 58% were seeing their mother by the final hearing and 42% (n=10) were not. When contact was not ordered between a child and mother, this was often due to the

⁴⁹ Some cases were dismissed at the request of one or other party or upon a joint request.

⁵⁰ This is the equivalent of 64 children.

⁵¹ None of the children in this category had been exercising contact at the time the court action was raised.

behaviour of the mother's new partner [See **Annex C**]. A small number of children changed residence to live with their other parent by the final hearing in the case (n=7) and the parents of an even smaller number had reconciled (n=3).

Correlation between views and outcomes

For the children whose views *were* taken, the *contact outcomes* were known for 50 of the 71 children whose express views are known. Of these 50 children, 44 children expressed clear views and six children were ambivalent. Where children expressed clear views:

- 45% had a contact outcome that was consistent with the view they expressed
- 20% had a contact outcome that partially accommodated the view they expressed (such as the mid-week visit being dropped if they said they wanted less contact).
- 34% had a contact outcome that bore no resemblance to the view they expressed.

Apart from two children who wanted to see more of their mother, all the children for whom the contact outcome bore no resemblance to their express views were children living with their mothers who either wanted no contact (n=10) or less contact (n=3) with their father. The abusive behaviour these children had been exposed to was often quite significant and no less severe than in cases in which contact was not ordered by the court [see **Annex D**].

The contact outcomes are known for six children who expressed ambivalent views and all but one of these children were the subject of a contact order by the final hearing in the case. However, the court sought to reduce the risk to the child by ordering non-residential contact (no overnight stays) or by ordering the contact be supervised by a family member [see **Annex E**].

Factors impacting on the weight attached to children's views:

- Whether the child's views are taken.
- Whether a court report is undertaken.
- The attitude of the person taking the views of the child on the significance of domestic abuse to the issue of contact.
- The prior involvement of statutory agencies with the families.
- The age of the child.
- Whether the 'contact' parent is the child's mother or their father.

Whether the child's views are taken

Weight can only be 'attached to' the view of a child, when that view is known. Although parents may strive to put the view their child has expressed to them before a court, this is 'hearsay' and a parent may be suspected of presenting the view they *want* the child to have, rather than making an objective assessment.⁵²

The absence of a child's expressed wish *not* to have contact may make it more likely that contact will be the final contact outcome (consistent with the assumption of contact).

⁵² However in *Sanderson v McManus* 1997 S.C. (H.L.) 55, the court gave weight to the mother's statement of her child's views as non family members gave evidence of the child's behaviour after contact with his father.

In **Table 4** it can be seen that children whose views were *not* taken were significantly more likely to be exercising contact at the final hearing in the case than those whose views were taken.

Table 4: Contact outcomes for children living with their mothers by whether or not their view were taken (n=90)

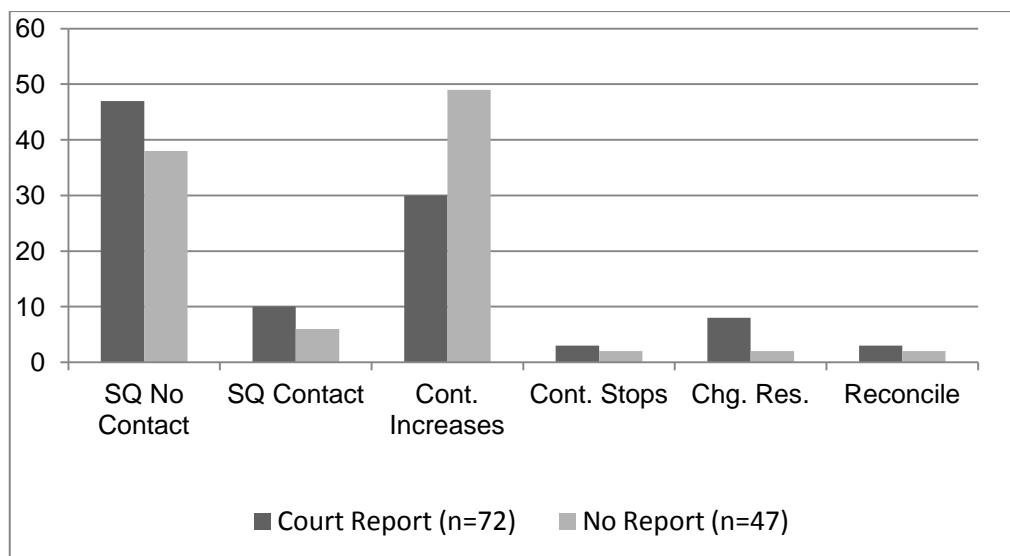
Contact outcome (n=90)	Views taken (n=38) %	Views not taken (n=52) %
Child having contact with non-resident parent	39%	54%
Child having NO contact with non-resident parent	61%	40%
Went to live with the other parent	N/A	4%
Parents reconciled	N/A	1%
	100%	100%

Very young children are arguably the most vulnerable and are the least likely to have their views on contact taken. If their views are consistent with those who *are* given an opportunity to be heard, this indicates that a significant number of very young children are ordered to exercise contact with a non resident parent that they may find distressing. That is, the assumption of on-going contact has the greatest impact on the youngest and most vulnerable children.

Whether a court report is undertaken

The undertaking of a court report decreased the likelihood of there being on-going contact, compared to cases in which no report was ordered. It is not clear the extent to which it is children's express views, or the evidence of the behaviours they were exposed to, that impacted most on the court outcome when court reports were undertaken. **Fig. 5** on the next page illustrates the impact of a court report on the contact outcomes for the 119 children whose contact outcomes are known.

Fig 5: Percentage of Outcomes by whether Report Undertaken or Not (n=119)



Attitude of the person taking a child's views on the significance of domestic abuse to contact

In some cases where a reporter uncovered evidence of domestic abuse and children said they did not want contact, it was still sometimes the reporter's recommendation that contact should take place. A third crucial factor influencing the outcome of the case was therefore the attitude of the individual appointed to undertake the report on the significance of abuse and children's views to the issue of on-going contact. Once appointed, some reporters chose not to follow up allegations of domestic abuse by contacting the police for a record of incidents at the family home or by obtaining extracts of convictions. Instead they might state only that they "do not intend to rehearse the allegations made by the parties against one another." This is particularly problematic when no Defences had been lodged.⁵³

Although most reporters spoke to children aged five and over, there were some reporters who avoided asking children specifically about the contact being sought, but rather limited the discussion to a general chat about the child's interests. An unfair burden was therefore placed on the *child* to raise the issue of contact, whereas children are accustomed to adults setting the parameters of the conversation (at least those who are unknown to them) and then responding to their prompts.

Those undertaking court reports also varied in the extent to which they were prepared to allow the child's view on contact, where expressed, to influence the contact outcome. This was particularly the case when children did not want contact. In the following two case examples, the children had witnessed their father's attacking their mothers and in both cases the children said they did not want to see their fathers. However in one case the reporter recommended contact and in the other, the reporter did not.

In the first case, two children aged eight and ten years of age had witnessed their father punch their mother in the head (their screams had alerted the neighbours who called the

⁵³ Defences were only lodged in two-thirds of cases and therefore the perspective of the parent the action is raised against (usually the parent the child is living with) was not always available to the court.

police). The girls told the reporter that “they do not want to see their father and will run away if they are made to see him.” However the reporter in this case concluded:

“There appear to be no child welfare based reasons why contact should not operate [...] I do not feel that either of the girls are sufficiently mature to be able to evaluate their feelings objectively. [...]The girls are obviously fearful of their father, but I do suspect this is a result of the perception of their mother’s reaction rather than a genuine fear of spending time with the pursuer.”

In the second case, a six year old had witnessed her father attempt to strangle her mother when she told him she was leaving. The child psychologist who was working with the child was of the view that contact was not in the best interests of the child. The child told the reporter she would not like to see her dad because she would “feel scared.” This reporter took her cue from the view of the professionals already involved with the family and stated:

“While it is generally accepted that is in theory positive for children to have a contact relationship with a parent post separation, there are some cases in which that is simply not the case because of issues between the parents. This is one such case in [her psychologist’s] view.”

As the contact outcome was consistent with the recommendations of the reporter in almost all cases, children were sometimes the subject of a contact order in some particularly high violence cases. Most of the children who wrote letters to the court did so in the context that the earlier court report had not resulted in the outcome they hoped for – in particular where the court ordered contact to continue and the child did not want to be ordered into contact.

Age of the child

Younger children were more likely to be having contact by the final hearing than older children. This may be because they are usually not deemed capable of formulating and expressing a view, but also it may be because less weight is attached to the views expressed by younger children when they are negative about contact. See **Table 5** below.

Table 5: Percentages of children of different age bands having contact by the last hearing in the case (n=119).⁵⁴

Birth – 2 years (n=18)	3 – 4 years (n=23)	5 – 6 years (n=16)	7 – 8 years (n=18)	9 – 10 years (n=10)	11 yrs & over (n=22)
72% (n=12)	78% (n=18)	81% (n=12)	61% (n=11)	60% (n=6)	23% (n=5)

Caution needs to be exercised when interpreting **Table 5** as the numbers of children in each age range is small. Nonetheless it is notable that the proportion of children having contact as a result of court process drops by the time a child reaches the age of seven years.⁵⁵

⁵⁴ Of the 119 whose contact outcomes are known, 64 were exercising contact at the final hearing.

⁵⁵ Only one of the seven children over 13 was having contact and 27% of 11-12 year olds were having contact.

Prior involvement of statutory agencies

Half of children (**Table 6**) who had *not* previously come to the attention of either the police or social workers were having contact, compared to just 17% when both agencies had been involved with the family.

Table 6: Impact of the Prior Involvement of Statutory Agencies on Contact Outcomes (n=99)⁵⁶

	No prior involvement (n=28)	Police only (n=41)	Police AND social work (n=30)
Contact Increased	50%	46%	17%
SQ No Contact	25%	41%	67%
SQ Contact	7%	5%	7%
Change Residence	7%	5%	3%
Reconciliation	-	2%	7%
Prior Contact Stops*	11%	-	-
	100%	100%	100% ⁵⁷

* Note: this occurred in only one case in which three children who were having contact with their mother at the time the case was raised, ceased to have any contact by the final hearing at the time of the data collection.

Gender of the 'contact' parent

There were only 14 children living with their fathers whose views are known. However it is notable that all the children who said they did not wish to see their *mother* had a contact outcome of no contact, while a quarter of children who did not wish to see their father were the subject of a contact order or residence order with their father by the last hearing in the case.

Court papers regularly emphasised the child's need for contact with their father in order to develop "self esteem" but there were no similar averments when the child's mother was the non-resident parent. Rather, in such cases, the pleadings usually referred to the previous established pattern of care, rather than the child's need for a mother *per se*.

⁵⁶ Of the 103 children in respect of whom *both* the contact outcome and the involvement of statutory agencies (or not) can be discerned, there were a further four children who had had the involvement of *social workers only*. These children are not included in Table 6. Two continued to have contact and two changed residence.

⁵⁷ Due to the rounding of some statistics, some totals may not equal 100%.

Nature of the final contact outcome

The nature of the contact ordered in the final hearing was determinable for most of the children who were known to be exercising contact at the final hearing in the case.⁵⁸

- 70% of children having contact, were having unsupervised contact.

However some sort of supervision or the use of a child contact centre was stipulated for the remainder of the children. Of these, 20% were having contact that was supervised by a family member and 6% were supervised by social workers, while the remaining 2% continued to have contact within a child contact centre. In three cases it was the child's mother (who had been a victim of domestic abuse at the hands of the child's father) who was expected to 'supervise' the contact between the child and his or her father.

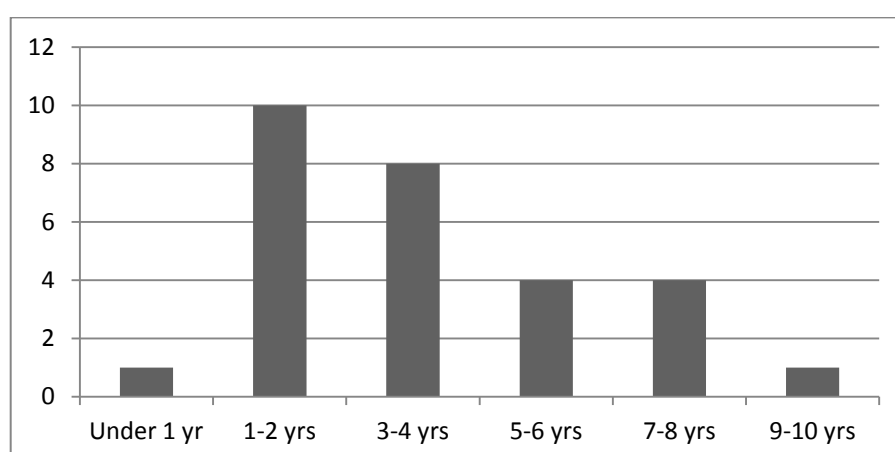
H: THE USE OF CHILD CONTACT CENTRES (CCC)

Child contact centres can provide a venue for contact to take place (see Glossary at **Annex F**). Staff within CCC (who are often volunteers) may be unaware of the history of abuse within the family and do not usually have a monitoring or reporting function, but 'facilitate' contact only.

- 38% of children who were the subject of a court order for contact had contact in a child contact centre.
- 66% of children subject to a contact order in a CCC were under four years of age.

A comparison was made with the rate of referral to CCC in cases in which there were no allegations of domestic abuse.⁵⁹ If the referral rates from the two courts which formed the basis of the "Listening to Children" study are representative of the use courts make of child contact centres, approximately three out of every four children referred to a CCC from the private law courts come from a home in which it is alleged there has been domestic abuse.

Fig 6: Ages of Children ordered to exercise contact in a Child Contact Centre (n=28).⁶⁰



⁵⁸ It was determinable for 50 of the 64 children known to be exercising contact.

⁵⁹ Taken from the author's original data set. There were 111 cases concerning 144 children in which domestic abuse was not alleged and only 10% of children were referred to a CCC in these cases.

⁶⁰ Only 66 of the children were the subject of a contact order at any stage of the process, 28 of *these* (38%) were to exercise that contact in a CCC.

Court reports (undertaken by solicitors) were ordered in respect of the majority of the children who exercised contact in a CCC and these reporters observed the contact within the child contact centre as well as observing the child with their resident parent. In some cases the reporter was appointed to investigate the circumstances of the child in advance of any contact being ordered and it was the reporter who recommended the contact take place in a CCC. An example of this is a case involving a six year old boy who had previously been hit by his father and shouted at during contact. As this was confirmed to the reporter by the child's paternal grandmother, the reporter recommended the contact take place every second week in a CCC.

A pattern among the data set cases where children were to exercise contact in a CCC was that the father did not attend the contact or was erratic in attendance. In one case a father who had been convicted of assault to severe injury for one of his assaults on the child's mother and who had attempted to drown her on another occasion, sought contact with his child after an absence of several years. Contact was initially ordered to take place in a CCC but the father did not turn up and the case was dismissed.

In another case, the court ordered the contact should take place in a CCC as the father had displayed sexualised behaviour towards the mother's older child (which the child had described to social workers). Contact appeared initially to be working well but this father lived a three hour train journey from his child and was not willing to continue to travel to the CCC in order to have contact with his child. This case was therefore similarly dismissed.

Contact outcomes for the cases in which contact was ordered in a CCC

The final contact outcome was only apparent for 19 of the 28 children who were ordered to attend a CCC. Just over half of these (53%) were exercising contact by the final hearing in the case – an almost identical percentage to children who did not attend a CCC at any point.

However, most of the contact was still supervised as only three of the 28 children had moved on to unsupervised contact outside the CCC. The remainder were either continuing to exercise observed contact (n=7) or were no longer having any contact with their non-resident parent (n=9). It is therefore likely that their case might return to court at some future point when one of the parties wished to revisit the issue of contact or alter the supervision.

Where the contact was observed at the time of the final hearing in the case, two children remained within the CCC and two were supervised by a relative and three were having contact supervised by social workers.

I: RECOMMENDATIONS

The findings from the analysis of court data highlight that courts in Scotland do make efforts to ascertain the views of children and that children's views are more likely to be taken in cases in which domestic abuse is alleged. Court reports were undertaken in respect of 58% of children from cases in which abuse is alleged.

However, in 42% of these cases in which there are allegations of abuse, *no* background reports were undertaken and in 45% of the cases children's views were not taken. Where there is no report, the assumption that contact will be in the child's best interests is more likely to determine the outcome of the case – with very young children being the *least* likely to be heard and the *most* likely to be the subject of an order for contact.

RECOMMENDATION 1:

It should not be assumed that children will benefit from contact when there is evidence the contact parent is domestically abusive but background reports should be conducted.

That said, even when a reporter *is* appointed there is significant variation in the weight that is attached to the views the children express, with a third of children having a contact outcome that bears no resemblance to the view they have expressed. Key factors affecting the weight attached to a child's views include the age of the child and the attitude of the individual reporter to the significance of domestic abuse. Some reporters are extremely reluctant to allow evidence of domestic abuse to undermine the assumption that children will benefit from on-going contact with both their parents even when the child is distressed by the behaviour of a parent during contact. Court reporters would therefore benefit from training on the impact of domestic abuse on children.

RECOMMENDATION 2:

Court reporters often uncover evidence of abuse and enable children to be protected. Their function and scope must be retained and supported through training on the nature of domestic abuse and its impact upon children.⁶¹ Reporters' practice should also be regularly reviewed.

At present children have little choice as to *how* their views are taken, with almost all children whose views *are* taken having them taken by a court reporter, social worker, or curator *ad litem*. Because they suspect children may not know what is in their best interests, many solicitors actively discourage potential child clients from putting their views *directly* to a court or via a representative in the form of their own solicitor. This is despite the Age of Legal Capacity (Scotland) Act 1991 stating a child is entitled to instruct a solicitor in any civil matter where they have the general understanding to do so.

RECOMMENDATION 3:

All those who take children's views should be trained in the benefits of participation for children and given materials to support participation in practice.

⁶¹ At the time of writing, the work of court reporters is under review by Scottish Government working group on bar reports. It is vital their scope is not reduced a measure intended to reduce civil legal aid expenditure (See: Scottish Government, *A sustainable future for legal aid* (2011); Sheriff Principal James Taylor, *Review of expenses and funding of civil litigation in Scotland: consultation paper* (November 2011).

At present very young children are the *least* likely to be spoken with for a number of reasons. Key among these are that legal practitioners feel they lack the ability to question very young children and because they often do not consider it appropriate to include children in disputes between their parents, as well as the fact that very young children are usually not considered capable of formulating a view.

RECOMMENDATION 4:

Improvements to the methods for taking the views of children are needed. Very young children would benefit from a specialist service of professionals with the skills to ascertain their views.

The training given to family law practitioners should include advice on the sensitive handling of the views of a child who is fearful of a parent learning the view they have expressed, in order that the child is not exposed to retaliatory abuse.⁶²

RECOMMENDATION 5:

Children should be protected from retaliatory abuse from a parent through careful reporting of their views.

At present, when a court appoints a court reporter to undertake a report there are no processes in place to ensure the child knows the purpose of the court reporter's visit, or has time to formulate a view in advance of being seen by the reporter. They are also not usually informed how their views will be used, nor who their views will be shared with and are not given any feedback or advised what they may do if they are not happy with the outcome of the court process. These should all be an integral part of ensuring children's 'genuine participation' within legal process.⁶³ When a reporter is of the view that the child would not understand the context in which their views are being taken even after careful explanation, or that this might cause them disproportionate distress or confusion (such as when a small child is currently unaware they have a father), the reporter should state within their report their reasons for not informing the child of the purpose of their visit. As the erroneous belief that children should be sent a copy of the Initial Writ when they receive the Form F9 puts practitioners off craving that a child be intimidated, practitioners need to be advised not to send a copy of the Initial Writ to children.

RECOMMENDATION 6:

While children should be aware of the purpose of having their views taken and how their views will be used, they should not be sent a copy of the Initial Writ.

RECOMMENDATION 7:

Children's views should be acknowledged by the court and feedback given to them which includes the contact details of the Scottish Child Law Centre.

⁶² Both regular training and regular *review* of those undertaking court reports were recommended by Lord Gill in his 2009 report on the Scottish civil courts. Gill, Rt. Hon. Lord, (2009) *Report of Scottish civil Courts Review*.

⁶³ See: Hart, R., (1997) *Children's Participation: the theory and practice of involving young citizens in community development and environmental care*. London, UNICEF (Earthscan publications).

J: IMPLICATIONS FOR FUTURE RESEARCH

It would clearly be worthwhile to undertake research into children's experiences of being heard in private law child contact disputes in cases in which there are allegations of domestic abuse so that our methods for hearing children may be improved. In particular, many of the youngest and most vulnerable children are currently not heard in these cases and the assumption of contact has the greatest impact upon them.

There is a clear need for research to focus on how the perspectives of these very young children may be included and inform the outcomes of child contact disputes.

Points to bear in mind when planning any such research include:

- Half the children who are the subject of a contact dispute before a court are aged six or younger so careful thought needs to be given to the age of children included in any study and appropriate means of obtaining their views.
- It is encouraging that although just over half the children in the cases before the court had their views taken, by the time children were five years or over 71% had their views taken.

In respect of accessing children and young people who are the subject of private law child contact disputes in which allegations of abuse are made, many such children have a parent in contact with other support services:

- Three out of every four children referred to a child contact centre by the courts are from families in which domestic abuse is alleged.
- 19% of the children were found to have a parent who was the subject of criminal proceedings at the time the child contact dispute was raised.
- 34% of children had social work involvement with the family.
- 24% of children were in a women's aid refuge.

Most children who have their views taken are spoken to by solicitors acting as a court reporter. It will therefore prove more difficult to trace children who have received the Form F9 or have spoken directly to a sheriff or who were represented by their own solicitor – unless they are accessed via solicitors.⁶⁴

The views of children with experiential knowledge of being the subject of a court dispute over contact should inform future practice in order that court process may be more attuned to the needs of children who wish to be heard and may operate to consistently promote the welfare of children.

⁶⁴ In the "Listening to Children" Study, the author interviewed two young people who had experienced having separate representation by a solicitor. One young person was accessed via the solicitor who represented them and the other via the solicitor who represented the child's mother.

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ANNEX A: METHODOLOGY

The data which is drawn on in this article is taken from the author's doctoral 'Listening to Children' research, which was funded by the Economic and Social Research Council (ESRC). This study comprised data collated on just under 300 children from 208 cases raised in two sheriff courts over the one calendar year. Two questionnaires were also undertaken as part of the study, one of solicitors and one of parents whose child's views had been taken by formal means as part of the court process. Thirty-three interviews were also undertaken with sheriffs, solicitors, parents, children and non-legal practitioners who support children experiencing court-ordered contact.

Court data

Data was collated from child contact disputes *between parents* which were no longer active at the time of data collection and were raised in two urban sheriff courts in different areas of Scotland over the one calendar year.⁶⁵

Over the 12 week data collection period it was possible to include *all* cases fitting the above criteria that had been raised in Court A (82 cases) and all cases fitting this criteria that were raised between 1 January – 14 September 2007 in Court B (126 cases), a total of 208 cases concerning 299 children. Not all cases were defended (that is no Notice of Intention to Defend and / or Defences were lodged), however the cases were included in the study as court reports were sometimes undertaken (and the child's views taken) even in the absence of Defences.⁶⁶

The year 2007 was selected as the year of study as this was after the statutory requirement to take account of the need to protect a child from abuse when deciding contact arrangements was introduced in Scotland in May 2006.⁶⁷ As the data was collected in 2009, this also gave a sufficient lapse of time for there to have been a resolution of the dispute in most cases, thus avoiding the problem of court papers still being in use and generally not available for research purposes. In this way, both cases that resolved rapidly and cases that took longer to reach resolution (perhaps because of more complex welfare concerns) were included.

Data in respect of each child was initially entered onto a data collection sheet and later coded and entered onto a computer for analysis using Predictive Analytics Software (PASW) for analysis.⁶⁸ Data was entered at child level (rather than case level) as the views a child expresses, and the contact outcome for that child, might be different from those of his or her siblings who are the subject of the same court action.

Domestic abuse was either alleged by one of the parents, or one of the parties had a conviction for domestic or child abuse, in respect of 155 children from 97 cases. For the

⁶⁵ A significant number of actions for the residence of a child (and related contact) are raised by grandparents when a child is placed with them by social workers in the event the child's mother is unable to care for the child (often due to substance abuse or violence within the home). These cases were not included in this study – with the exception of four cases where the grandmother raised the action but the issue in dispute was the presence of the child's non-resident parent in her home during contact.

⁶⁶ There was evidence courts are reluctant to *grant orders* in respect of a child without making enquiries.

⁶⁷ Family Law (Scotland) Act 2006, s24 amending Children (Scotland) Act 1995, s11 (7).

⁶⁸ Known more usually as 'SPSS.'

purpose of this research briefing for the office of Scotland's Commissioner for Children and Young People, an analysis was made of only these cases.

Questionnaire data

Two surveys were also undertaken as part of the study, one of solicitors and one of parents who had a child whose views had been taken as part of court process. Interviews were conducted with nine of the solicitors and eight parents who returned a questionnaire and indicated they were willing to be interviewed. Two parents gave permission for their child to be interviewed also and both children (aged 11 and 12) were keen to have their say. Seven sheriffs working within the sample courts were interviewed and nine non-legal practitioners who support children experiencing court-ordered contact were also interviewed.

All solicitors listed on the website of the Family Law Association of Scotland (n=279) were sent a Questionnaire for solicitors as well as an unsealed "Parent Information Pack" for forwarding to a former client whose child had had their views taken as part of the court process. The "Parent Information Pack" contained an explanatory letter, the Questionnaire for Parents and a Research Information Leaflet aimed at children and young people (as well as a postage paid return envelope).

Three weeks after the first posting, all solicitors were contacted by email and sent the link to an online version of the Questionnaire for Solicitors. The Questionnaire for Parents also included the web address of an online version of the Questionnaire for Parents. Both research instruments invited respondents to indicate if they were willing to be interviewed.

Information about the study and Questionnaires for Parents was also disseminated in the offices of the Scottish Child Law Centre, the office of Scotland's Commissioner for Children and Young People, Family Mediation Scotland and other organisations supporting children and their parents.

Ninety-six completed Questionnaires from solicitors were received and 28 completed Questionnaires from Parents.

ANNEX B: SAMPLE CASES

CHILDREN SPOKE TO A SHERIFF

Case One

The first of these children was a 12 year old boy who had stayed week about with each parent over the year since separation; however this pattern broke down when the boy's father retained him after contact and told the boy's mother that their son wanted to live with him now. He was seeing his mother approximately one day a week at the time she raised the action for divorce and residence of her son. Two months after the action was raised the sheriff arranged to hear the boy directly and thereafter he ordered the boy should have contact with his mother two evenings a week and one weekend a month.

Case Two

In the second case, the sheriff attached conditions to the contact that the non-resident father was to have with his 11-year-old daughter after speaking with the girl. These were that her father's girlfriend was not to be present, that he was not to receive phone calls during contact and that there was to be no 'bickering' between her parents at collection and drop-off times. By the final hearing in which the divorce degree was granted the affidavit explained that the girl was having contact for six hours on alternative Saturdays "as agreed between the parties." The conditions attached to contact may have resulted in a re-negotiation of the amount of contact.

ANNEX C: SAMPLE CASES

CONTACT OUTCOMES – MOTHER AND CHILD

In the cases in which the contact outcome was discernible, 42% of the children living with their fathers at the time the case came to court had no contact with their mothers by the final hearing in the case.

In the cases where mothers were not exercising contact by the final hearing in the case, this was often due to the behaviour of their new partner.

Case One

In one of these cases the father ejected the mother of children aged 15, 11 and 9 years who had been their primary carer while their father worked away as a long distance lorry driver. Their father accused the mother of having affairs when he was away and of abusing alcohol. Residence was granted to the father but no contact order was made in the context that the mother failed to attend court hearings. The mother's new partner was violent and had pulled a knife on the children during contact, resulting in the children not wanting to go for contact with her.

Case Two

In another case the father ejected the mother and physically removed her from the family home when she visited to have contact with her son. The father claimed the mother's new partner was a paedophile and alleged he had subsequently been 'beaten up' by this man. Social workers investigated the allegation of paedophilia and said they believed it was unfounded. Nonetheless the court did not make an order for contact between the child and his mother at the time it awarded residence to the father. The child's view was not taken.

Case Three

In this case the children were placed with a grandparent due to their mother living with a man who had been convicted of a Schedule 1 offence against a child and their father being in prison serving a five year sentence for drug dealing. Their father had previously served a prison sentence for assaulting the children's mother. When their father was released from prison he took the children to live with him and contact between the children and their mother stopped. Interim contact was ordered between the 12-year-old child of the action and her mother but the child told the reporter her mother had merely "left her in a room while she focused on her boyfriend." The girl was therefore of the view that "it was not a 'quality' visit but was 'boring'". No further contact was ordered by the court.

THERE WERE NO CHILDREN ORDERED TO HAVE CONTACT WITH THEIR MOTHER AGAINST THEIR EXPRESS WISHES IN THE DATA SET

ANNEX D: SAMPLE CASES

CONTACT OUTCOMES – FATHER AND CHILD

NO CONTACT

Case One

In one case a mother had fled with her three children to a refuge after sustained violence which included rape witnessed by at least one of her children. Social workers informed the court that they had been repeatedly advised by the police that they should not let the children's father near them and expressed the view that the mother was "acting appropriately" by removing the children from the home to a refuge. The oldest child (aged 13) told the reporter she did not want any further contact with the pursuer and described him "hitting, kicking her mother and throwing furniture." No contact was ordered.

Case Two

In a second example, a mother left the family home with her three children after her eldest child alleged sustained sexual abuse by her step father for which he had been charged and social workers enabled the mother to flee. The reporter spoke with all three children. The reporter said of one child (aged 13), "[he] knows they don't have contact because dad raped his older two sisters. He remembers his dad hitting him and said he could show me the scars. He can remember [pursuer] having them all in the car and saying he was going to kill them all." The reporter asked the boy to say how happy he is on a scale of one to ten where 'one' is sad and 'ten' is happy. The boy said he was currently a '10'. When asked how he had felt when he lived with his dad he said, 'one.' The youngest of the children when asked "how would you feel if your parents decided you should see your dad?" responded: "sad and scared." Again, no contact was ordered.

CONTACT AGAINST CHILD'S WISHES

Case One

In one case, three children aged 15, 12 and 10 years of age had not seen their father for six years and did not wish to have contact with him against the background that he had several convictions for assaults upon their mother, which had resulted in injuries that included broken bones. The children remembered the time that their father lived with them and his drinking and how they felt "scared and unsafe." The reporter concluded that contact would not be beneficial for the children due to the "long-standing alcohol abuse, the fact that the [father] is prone to violence and that the violence has taken place in front of the children." There was evidence of police call-outs and convictions for abuse and the children expressed clear views that they did not want contact. Nonetheless the court ordered contact of four hours per week.

Case Two

In another case, against a background of sustained violence, the father of three children had broken into the family home and raped their mother two years after separation. The father was awarded parental rights and responsibilities by the court in respect of the children a few months later. The father repeatedly lodged motions for increasing amounts of contact. The case returned to court when the eldest child was himself kicked repeatedly by his father and it was at this point the court took the view he should be able to determine for himself if he wished to continue to go for contact visits or not. The younger two children continued to be subject to a contact order against their wishes.

Case Three

A third example is a case where two children aged nine and ten years were already known to social workers having been referred to the children's hearing system due to their father's violence and drug use. Their father had served prison sentences for both of these offences. Their mother was a recovering alcoholic and had placed the children with their father temporarily as she thought they might otherwise be taken into care. The father of the children then raised the court action seeking parental rights and responsibilities in respect of the children and residence of them. The social work department submitted a report in which it stated the children's father was "not a suitable person to care for the children due to violence, a short temper and drug abuse," and the male child stated that "dad has hit him more in the last six weeks than mum did in the last six years". The court granted the father parental rights and responsibilities and residence of both the children. This is the only case in the data set where the contact ordered by the court was at complete odds with the recommendation of the reporter.

ANNEX E: SAMPLE CASES

CONTACT OUTCOMES WHEN CHILD IS AMBIVALENT

Seven children expressed ambivalence in respect of contact with their non-resident father. Contact was ordered in respect of six of the seven children but it was often supervised.

Case One

In one case a four year old girl was clear she loved her dad but also said she did not like his drinking and described how he would fall over when he was carrying her. This was recorded in the data set as the child expressing 'ambivalence' in respect of contact. There was evidence of significant violence and her older sibling had previously been removed into care because of this. The court ordered contact between the child and her father every Sunday afternoon and Wednesday evening *but* in line with the recommendation of the reporter this was limited to non-residential contact because the father was such a heavy drinker.

Case Two

In another case a five year old boy had witnessed an assault upon his mother by his heroin addicted father and was now bedwetting and clinging to his mother. The child's mother claimed the boy's father took drugs in front of him as the boy returned from contact knowing the names of different drugs. The father was the subject of criminal proceedings for assault on the boy's mother at the time the action was raised and admitted being a heroin addict for 16 years to the reporter. Both neighbours and the child's school teacher confirmed the boy's behaviour had improved since his mother had separated from his father and his mother said the boy had told her he did not want to see his father. When the reporter spoke to the boy he was happy to speak about his favourite toys and DVDs but immediately changed the subject when asked about his father. The court ordered residential (overnight) contact one day per week to be supervised by the boy's paternal grandmother.

Case Three

In another case a mother who alleged she had endured repeated rape when living with the father of her son claimed the six year old was emotionally abused during contact as his father allegedly told the boy that she did not love him and that he (the father) was going to die, which had distressed the boy. When the reporter spoke to the boy, the boy stated that he did not miss his dad but the boy was unable to give a reason for this. The court carefully asked the reporter to undertake a supplementary report specifically to gauge the boy's view on contact but the reporter undertaking this report just reported that he had observed the boy staring out a window during contact and stated he "did not consider it appropriate to speak to him." Residential contact was ordered every second weekend.

ANNEX F: GLOSSARY OF LEGAL TERMS

Acts of Sederunt: Acts passed by the Lords of Council and Session relating to civil procedure.

Affidavit: A signed statement made on oath which in civil cases may remove the requirement on the person making the statement to appear in court.

Child Contact Centre: The first child contact centres were opened in Scotland in 1988. Family Mediation Lothian and One Parent Families Scotland were the first to provide the service. They aim to provide a space in which a child can have contact with their non-resident parent in a public space (as opposed to a private home) where the child may be protected from conflict between parents. Most contact is 'supported' by volunteers and contrasts with 'supervised' contact that may be provided by social workers involved in public law cases.

Children's Hearing System: Since 1971 the Children's Hearings System in Scotland has dealt with most *public* law cases (between the state and the individual) concerning the welfare of children and young people under 16 (and in some cases under 18) who commit offences or who are in need of care and protection. This is separate from the court system. Children are referred to a **Reporter** who investigates the case and determines if a hearing is necessary. If so, those responsible for the child and the child him or herself appear before three children's panel members (who are unpaid but trained members of the public). The Children's Hearings (Scotland) Act 2011 has recently reformed the system.

Children's Reporter: A key figure in the Children's Hearing System (see above).

Child Welfare Hearing: A hearing held in a closed court where only the parties to the action and their representatives are present. It is intended to be less formal and to enable the sheriff to speak directly with the parties. Actual practice varies significantly between courts.

Civil Procedure: The procedure used in actions which are not criminal cases, such as those involving disputes between individuals or organizations (see also: **protective order** for examples of civil protective orders).

Compulsory Supervision Order: may be made by at a Children's Hearing (now under section 83 of the Children's Hearings (Scotland) Act 2011). It stipulates where a child is to live and may include a direction regulating contact between a child and a specified person. It also appoints a local authority to be responsible for the giving effect to the measures in the order.

Court Reporter: A person appointed by a *court* (and not part of the Children's Hearings System) to undertake a report into the circumstances of the child. Solicitors are usually appointed to do these reports.

Curator *ad litem* A person appointed by the court to represent and protect the interests of a person lacking full capacity, including a child, for the purposes of a specific action only.

Crave: The outcome sought by the party to an action (eg: a Contact Order) as stated in the Initial Writ or Defences.

Defences: The statement lodged at court by the defender outlining his or her position and usually also making his or her own craves for orders.

Defender: The party against whom a civil action is brought, who, if the pursuer's craves are opposed may lodge Defences. Not all cases are defended.

Exclusion Order: A civil order made under section 4 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 which excludes one or other spouse or cohabitant from the home where it appears to the court that the order is necessary for the protection of the applicant or any child of the family.

Form 9 (F9): Form of intimation of children in an action that includes a crave for an order under Section 11, Children (Scotland) Act 1995. The child can state what their views are or nominate someone to state those views for them. It is then returned to the sheriff in a postage paid envelope.

Initial writ: The document by which ordinary civil proceedings in the sheriff court are normally initiated by being lodged by the pursuer's solicitor.

Interim: A decision or order of the court that will last until subsequent orders are made (as opposed to a final order or the judgement made in a proof hearing).

Interlocutor: The written record of the outcome of a hearing in a case. This will contain any orders made and whether or not they are interim orders.

Joint Minute: An application to court signed by both parties to an action (or their agents) stating an agreed position.

Parental Rights and Responsibilities: The rights and responsibilities automatically held by biological mothers and by fathers who are either married to the mother or named on the birth certificate of the child. These are to be found at s1 and s2 of the Children (Scotland) Act 1995.

Private Law: Law concerning relationships between individuals (rather than between the state and individuals).

Process: This refers to all papers lodged with the court in a civil action.

Proof: The final hearing in a case during which a sheriff will hear evidence from both sides, make findings of fact and determine the appropriate orders to make.

Protective Order: In this paper the term 'protective order' is used as a generic term for orders that prevent one person behaving in a particular manner towards another or requiring them to stay away from a person or place. This includes Exclusion Orders (see above) and orders under the Protection from Harassment Act 1997 and the Protection from Abuse (Scotland) Act 2001 as well as non-molestation orders.

Pursuer: The person suing in an action. The English equivalent is plaintiff.

Section 11 Orders: Section 11 of the Children (Scotland) Act 1995 enables orders to be made to either grant, remove, or specify the implementation of the rights and responsibilities of parents including which parent the child lives with and the amount of contact between the child and the non-resident parent.

Schedule 1 offence: An offence against a child contained within Schedule One of the Criminal Procedure (Scotland) Act 1995.

Sheriff: Sheriffs deal with the majority of civil and criminal court cases in Scotland. They must have been qualified as a legal practitioner for at least ten years and have considerable court experience.

Sist: This has two meanings being: (i) To stay or stop the process

(ii) To summon or call a person as a party.

Sisted: When an action is sisted, no further hearings are set (but the case is not dismissed).

Scottish Legal Aid Board: The body responsible in Scotland for granting the use of public funds for the defence of criminal cases and for advice, assistance and representation in civil cases where the litigants are on low incomes.

ANNEX G – FORM F9

Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993

Form F9 Form of intimation in an action which includes a crave for a section 11 order

Rule 33.7(1)(h) Court Ref. No.

PART A

This part must be completed by the Pursuer's solicitor in language a child is capable of understanding

To (1)

The Sheriff (the person who has to decide about your future) has been asked by (2) to decide:-

(a) (3) and (4)

(b) (5)

(c) (6)

If you want to tell the Sheriff what you think about the things your (2) has asked the Sheriff to decide about your future you should complete Part B of this form and send it to the Sheriff Clerk at (7) by (8) . An envelope which does not need a postage stamp is enclosed for you to use to return the form.

IF YOU DO NOT UNDERSTAND THIS FORM OR IF YOU WANT HELP TO COMPLETE IT you may get free help from a SOLICITOR or contact the SCOTTISH CHILD LAW CENTRE ON the FREE ADVICE TELEPHONE LINE ON 0800 328 8970.

If you return the form it will be given to the Sheriff. The Sheriff may wish to speak with you and may ask you to come and see him or her.

NOTES FOR COMPLETION

(1) Insert name and address of child.

(3) Insert appropriate wording for residence order sought.

(5) Insert appropriate wording for contact order sought.

(7) Insert address of sheriff clerk.

(9) Insert court reference number.

(2) Insert relationship to the child of party making the application to court.

(4) Insert address.

(6) Insert appropriate wording for any other order sought.

(8) Insert the date occurring 21 days after the date on which intimation is given. N.B. Rule 5.3(2) relating to intimation and service.

(10) Insert name and address of parties to the action.

PART B

IF YOU WISH THE SHERIFF TO KNOW YOUR VIEWS ABOUT YOUR FUTURE YOU SHOULD COMPLETE THIS PART OF THE FORM

To the Sheriff Clerk, (7)

Court Ref. No. (9)

(10).....

QUESTION (1): DO YOU WISH THE SHERIFF TO KNOW WHAT YOUR VIEWS ARE ABOUT YOUR FUTURE?

(PLEASE TICK BOX)

YES

☐

NO

☐

If you have ticked YES please also answer Question (2) or (3)

QUESTION (2): WOULD YOU LIKE A FRIEND, RELATIVE OR OTHER PERSON TO TELL THE SHERIFF YOUR VIEWS ABOUT YOUR FUTURE?

(PLEASE TICK BOX)

YES

☐

NO

☐

If you have ticked YES please write the name and address of the person you wish to tell the Sheriff your views in Box (A) below. You should also tell that person what your views are about your future.

BOX A:

(NAME)

(ADDRESS)

.....

**Is this
person -**

**A friend?
A teacher?**

<input type="checkbox"/>
<input type="checkbox"/>

**A relative?
Other?**

<input type="checkbox"/>
<input type="checkbox"/>

OR

QUESTION (3): WOULD YOU LIKE TO WRITE TO THE SHERIFF AND TELL HIM WHAT YOUR VIEWS ARE ABOUT YOUR FUTURE?

(PLEASE TICK BOX)

YES

☐

NO

☐

If you decide that you wish to write to the Sheriff you can write what your views are about your future in Box (B) below or on a separate piece of paper. If you decide to write your views on a separate piece of paper you should send it along with this form to the Sheriff Clerk in the envelope provided.

BOX B:

WHAT I HAVE TO SAY ABOUT MY FUTURE:

NAME:

ADDRESS:

DATE:



**Scotland's Commissioner
for Children & Young People**

**Scotland's Commissioner for Children and Young People
85 Holyrood Road
Edinburgh
EH8 8AU
Tel: 0131 558 3733
Young People's Freephone: 0800 019 1179
Fax: 0131 556 3733
Web: www.sccyp.org.uk
Twitter: @RightsSCCYP**